to rectify such problems directly. There is no need for imposing the negative option prohibition in these cases, especially where there is no logical nexus between the rate increase and the negative option definition.

Accordingly, the Commission should clarify that the following practices are not negative options:

(1) Adding services to a subscriber's existing basic or non-basic service and simultaneously raising the price. This is a rate increase that may be subject to FCC standards, but not a negative option.[297]

(2) Deleting services from an existing basic or non-basic service without an appropriate rate reduction. This might be an implicit rate increase covered by the evasion section, but not a negative option.

(3) Dividing a subscriber's existing single service tier into multiple offerings and raising the total price. Again, this is a rate increase which may be subject to FCC standards, but not a negative option. The subscribers have been given the positive option not previously available to select only a portion of the prior offering.

(4) Dividing a subscriber's existing single service tier into multiple offerings at the same net price. This is not even a rate increase.

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[297] See, e.g., 47 U.S.C. § 543(b)(7)(B) ("[a] cable operator may add additional video programming signals or services to the basic service tier").

Thus, for example, the addition or deletion of programming services to or from existing basic or non-basic service tiers is not a negative option.[298] Similarly, a cable operator that divides an existing multichannel tier into two or more smaller tiers has not employed a negative option for those subscribers currently taking the large service package. These subscribers have been given the positive option not previously available to select only a portion of the prior offering. The Act permits retiering and, in some cases, may require it.[299] Accordingly, the Commission must provide sufficient flexibility for the implementation of service reconfigurations imposed by the statute, which, at a minimum, removes such reconfigurations from the negative option label.

Additionally, the offering on an a la carte basis of a cable network that was previously part of a regulated tier is not a negative option if the overall rate is revenue neutral. For example, if cable service "X" is offered as part of a tier for ten dollars, and the cable operator decides instead to offer "X" a la carte for one dollar and the remainder of the tier for nine dollars, no negative option has occurred, because subscribers have previously requested "X" and are not being subjected to a rate increase in connection of the separation of "X" from the

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[298] See, e.g., id.

[299] Id. at § 543(b)(7); see also Notice at ¶ 127.

tier.[300] Similarly, if the remainder of the tier continues to be priced at ten dollars and one dollar is charged for "X," this is also not a negative option, although two separate rate increases have taken place, triggering a potential "bad actor" complaint for the tier which now contains fewer channels with no reduction in price.[301] "X", which is now offered a la carte, would not be subject to rate regulation, but subscribers would be free to drop it at any time. Thus, adding to, changing, or splitting the preexisting programming mix is not a negative option, and the cable operator is therefore under no obligation to remarket each offering to its subscribers.[302] A negative option only occurs when a subscriber is delivered, and billed for, an entirely new service or package of services that was not previously part of the services delivered to that subscriber, and which the subscriber has not affirmatively requested by name.

VII. EVASIONS

Section 623(h) of the Act requires the Commission to "establish standards, guidelines, and procedures to prevent evasions, including evasions that result from retiering, of the

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[300]Of course, the cable operator in this example could be subject to a franchising authority requirement to provide thirty days' advance written notice of such programming change. 47 U.S.C. § 544(h).

[301]With such an implicit rate change on the basic service level, the cable operator is subject to the further requirement to provide thirty days' advance notice to the franchising authority of the rate increase. Id. at § 543(b)(6).

[302]Id.

requirements of this [rate regulation] section."[303] The term "evasion" is ripe with negative connotations -- it implies that the cable operator is violating the letter and the spirit of the 1992 Cable Act. Accordingly, the Commission must take care in defining what constitutes an evasion.

First, it is clear that retiering per se is not an evasion under the 1992 Cable Act. Rather, the statute is intended to prohibit "evasions that result from retiering."[304] If retiering itself were automatically an evasion, the "result from" language in Section 623(h) would be superfluous. The cable operator's right to retier remains unfettered even if inconsistent with local franchise requirements, since this long-established right[305] has been reaffirmed by the 1992 Cable Act. Indeed, because of the new statutory definition of minimum basic service,[306] which the Notice recognizes may require retiering,[307] the cable operator's right to retier has been bolstered by the 1992 Cable Act.[308]

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[303]47 U.S.C. § 543(h).

[304]Id.

[305]See In re Community Cable TV, Inc., 95 FCC 2d 1204 (1983), recon. denied, 98 FCC 2d 1180 (1984).

[306]47 U.S.C. § 543(b)(7).

[307]Notice at ¶ 127.

[308]See also Conf. Report at 65 (specifically allowing "changes in the mix of programming services that are included in various tiers of cable service").

The Conference Report recognized "that many cable operators have shifted cable programming out of the basic tier into other packages and that this practice can cause subscribers' rates for cable service to increase."[309] The Commission also recognizes this distinction in the Notice:

> [W]e propose to prohibit an unjustified increase in rates to subscribers for cable service resulting from retiering that 'shift[s] cable programs out of the basic tier into other packages.' At the same time, the Cable Act of 1992 permits, and indeed appears to require in some cases, a restructuring of service offerings.[310]

Accordingly, a reading of the statute, its legislative history, and the Notice confirms that "evasion" is not intended to proscribe conduct which would be consistent with the 1992 Cable Act's rate regulation provisions. Therefore, the Commission has correctly determined that "[r]etiering necessary to comply with basic tier requirements, retiering that did not change the ultimate price for the same mix of channels in issue to the subscriber, or retiering accompanied by a price change that complied with our rate regulations would not be deemed an evasion."[311]

Put another way, retiering that is price neutral (the same services for the same ultimate price, just packaged differently) is clearly not an evasion. On the other hand, a cable operator

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[309]Id. (emphasis added).

[310]Notice at ¶ 127 (emphasis added) (footnotes omitted).

[311]Id.

may not "evade" the rate review requirements of the 1992 Cable Act by claiming that a rate increase has not resulted from retiering that in fact changes the ultimate price of the services. Thus, any retiering, splitting of tiers, or other actions that result in less service (i.e., fewer channels) to the subscriber is an implicit rate increase even if the actual price remains the same. Such price increases would then be exposed to the appropriate scrutiny (e.g., under the basic benchmark or bad actor test) to determine reasonableness.

For example, if a cable operator removes two channels from a tier and retains the same price, the operator cannot evade rate review by claiming that there has been no "rate increase" merely because the price had remained the same. To the contrary, an implicit rate increase has been imposed as to that tier because the subscriber is receiving fewer channels for the same price. Such a rate increase would be subject to scrutiny pursuant to the applicable rate review procedures ultimately adopted by the Commission. However, if the cable operator removes two channels from a tier and replaces them with two different channels, while not changing the ultimate price, the Commission is in no position to rule that an evasion has occurred because the new channels are somehow less "valuable" than the channels that were removed. As Congress has determined, "changes in the mix of programming services that are included in various tiers of cable service"

should be left to the cable operator's discretion.[312] Any other interpretation would necessarily involve the Commission in making value judgments regarding the content of channels, an area that the Commission is neither permitted nor equipped to enter.[313]

Additionally, we note that "mix or quality" of service are not subject to local review in the franchise renewal process.[314] This type of content review is thus off limits to local government as well as the Commission, and there is no evidence that Congress intended the cable operator's discretion over the mix or quality of service to be negated in the context of "evasions." The cable operator's right to retier and to determine the mix or quality of service with no governmental intrusion cannot be swept away by the broad brush of "evasion."

On the other hand, it would be easily quantifiable, identifiable, and apparent to the Commission if a cable operator decreased the level of cable service on a tier while keeping the price the same. Likewise, it would be readily identifiable if the cable operator decreased the level of service on a tier and

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[312]See Conf. Report at 65.

[313]Such expansive Commission intrusion into cable operators' First Amendment editorial rights would surely be found unconstitutional by the courts. See, e.g., City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1985); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied., National Association of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986); Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), cert. denied, National Association of Broadcasters v. Century Communications Corp., 486 U.S. 1032 (1988).

[314]See 47 U.S.C. § 546(c)(1)(B).

decreased the price, but by a smaller amount in proportion to the decrease in service. For example, if two channels were dropped from a ten channel tier, but accompanied by only a ten percent price decrease, this would also be an implicit price increase. Both situations result in a higher price per channel, which can easily be ascertained. Such a definition of "evasion" would thus be consistent with the 1992 Cable Act's policy goal directing the Commission to "seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission."[315]

In sum, Congress has intended that the concept of evasions is in no way meant to foreclose a cable operator's right to tier or rearrange services. Rather, as the Commission apparently recognizes, the prohibition against evasions is meant to target the appropriate rate for the reconfigured service tier that now contains a smaller level of services. The remedy for an "evasion" is to subject the reconfigured service level to the appropriate rate test as ultimately adopted by the Commission. However, any judgments by the Commission regarding a cable operator's programming mix in this situation, where the level of service remains the same, improperly involves the Commission (or local authorities) in content judgment, in violation of the concepts contained in both of the 1984 Cable Act and the 1992 Cable Act, as well as the First Amendment.

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[315] Id. at § 543(b)(2)(A).

VIII. GRANDFATHERING OF RATE AGREEMENTS

The Commission seeks comment on the adoption of rules regarding the treatment of agreements between a franchising authority and a cable operator that provide for the regulation of basic cable service rates where there was no effective competition under governing Commission rules.[316] Although the 1992 Cable Act provides that such agreements are to be grandfathered if they were entered into prior to July 1, 1990, there is no rational basis for differential treatment of agreements concluded after that date.[317] The 1992 Cable Act does not specifically address how franchising authorities operating under identical agreements entered into after July 1, 1990 are to make the transition to rate regulation under the Commission's new rules. The Commission, therefore, seeks comment on the treatment of these agreements as well.[318] The Commenters assert that any rate regulation agreement of this type still in effect upon implementation of these rules, whether concluded before or after July 1, 1990, should be treated in the same manner -- all should be grandfathered. There is simply no reason to treat valid pre-

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[316]See Notice at ¶¶ 134-35.

[317]See 47 U.S.C. §543 (j).

[318]See Notice at ¶ 135.

July 1, 1990 and valid post-July 1, 1990 rate regulation agreements differently.[319]

Any rules implementing Section 623(j) should apply only to basic cable service as defined by new Section 623(b)(7). Under this definition, cable operators are free to retier their cable programming. Any rates for non-basic tiers of "cable programming service" are then subject to exclusive Commission review pursuant to Section 623(c).

Finally, any grandfathered basic rate agreements between a franchising authority and a cable operator must be enforceable by either party, regardless of whether the rate provided under such an agreement is greater or less than rates that might result under the Commission's new rate formula. The purpose of grandfathering existing basic rate agreements is to exempt such agreements from the rate regulation rules implemented pursuant to Section 623,[320] because those basic cable rates have already been regulated, via agreement, where the cable system that is a party to the agreement was not subject to effective competition under the Commission's regulations in effect when the agreement was concluded.

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[319]The legislative history is silent as to the treatment of post-July 1, 1990 rate regulation agreements. See House Report at 89 (section-by-section analysis of 1992 Cable Act addresses only pre-July 1, 1990 rate regulation agreements).

[320]See House Report at 89.

IX. COLLECTION OF INFORMATION AND REPORTS ON AVERAGE PRICES

The Commission seeks comment on the scope, availability and burden of providing the Commission with financial information necessary for the effective administration and enforcement of rate regulation.[321] The Commenters contend that cost data should not be included in the information collected because it will not be necessary for the administration and enforcement of the preferred type of rate regulation, which is not based on cost of service. Thus, the detailed cost-based annual reports, cost of service standards, and cost accounting requirements proposed in Appendices A-C of the Notice are wholly at odds with Congressional directives that the FCC "avoid erating a cable equivalent of a common carrier "cost allocation manual.'"[322] The Commenters advocate a rate comparison benchmark for the regulation of basic cable service rates, thereby alleviating the need for collection of burdensome cost of service information. Moreover, the fact that Congress is requiring periodic reports from the Commission on average cable prices affirms the Commenters' position that the collection of cost data is unnecessary, and was not intended by Congress when it enacted Section 623(g).[323]

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[321]See Notice at ¶¶ 122-24.

[322]House Report at 83.

[323]See 47 U.S.C. § 543(k).

Rules implemented by the Commission in accordance with Section 623(g) should by no means require the collection of information beyond that requested on the forms sent to selected systems on December 23, 1992.[324] The information sought on those forms wisely pertains to revenue only, thereby avoiding competitively sensitive cost data which would trigger confidentiality concerns for the cable operator and the Commission. Furthermore, the plain language of Section 623(g) and the legislative history of that provision state that the Commission's rules should require only the collection of information that is absolutely necessary to administer and enforce rate regulation, and not extra, burdensome data, such as cost of service information.[325]

The Commission's rules on collection of information should impose as light a burden as possible on cable operators who are responsible for gathering the information required by the Commission. Accordingly, the Commenters assert that all data required of cable operators should be collected and submitted to the Commission on a per-system, rather than a per-franchise,

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[324]See Order, MM Docket No. 92-266 (released December 23, 1992).

[325]See 47 U.S.C. § 543(g) (cable operators must file with the Commission "such financial information as may be needed for purposes of administering and enforcing this [rate regulation] section"); House Report at 88 (cable operators must file "information necessary to administer and enforce" the rate regulation section).

basis.[326] Cable operators do not ordinarily keep detailed information on a franchise-by-franchise basis. If the Commission required information on this basis, it would impose a heavy burden on the cable operator to develop such data solely for the purpose of complying with the Commission's information requests. To impose such a burden when it is unnecessary would be inconsistent with Congress' goal that "the Commission [ ] shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission."[327] The Commenters further assert that all Commission requests for cable system data rate should be contained in a single form so that the cable operator will know the full extent of information required for each system.[328]

The Commission's rules regarding collection of information should also be sufficiently tailored so that they do not apply to public companies that are already required to file such information for public disclosure. Finally, the Commission should not finalize its collection of information forms in this proceeding. Rather, the Commission should issue a further notice after the conclusion of its rate proceedings so that the forms

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[326]See Notice at ¶ 138.

[327]47 U.S.C. § 543(b)(2)(A).

[328]See Notice at ¶ 138.

can be specifically tailored to the rate regulations actually implemented in this proceeding.[329]

X. EFFECTIVE DATE

Section 623 of the Act requires the Commission to promulgate rules for the regulation of basic service rates, cable service rates and evasions within 180 days of enactment, i.e., by April 3, 1993. While the rules must be in place by then, as the Commission correctly recognizes, the statute does not require that such regulations must take full effect on that date.[330] There are many reasons why cable operators (and franchising authorities) will need time to implement the rules.

To begin, rules for the regulation of basic and non-basic service rates will not exist in a vacuum. The implementation of these rules depends on actions taken in accordance with other provisions of the Act. For example, the composition of the basic tier will not be known until the must-carry/retransmission consent election has been made, and any negotiations required thereby have been completed. Therefore, rate regulation rules cannot go into effect until some time after the must-carry/retransmission consent election deadline, which has not yet been set.

Moreover, the fate of existing non-superstation carriage, and the costs of such carriage if it can be continued, will not

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[329] See id. at ¶ 123.

[330] See id. at ¶ 143.

be known until October 1993. Additionally, there will be equipment changes, subscriber billing implementation, retiering to satisfy basic service requirements, preparation of subscriber education and marketing materials, notice requirements for proposed increases in basic service rates,[331] etc. All of these changes will take time, some even several months, and action on many of them cannot be taken until after the must-carry/retransmission consent election. Finally, there may be loss of subscriber revenue as a result of downgrading to the new basic service tier.

All of these factors militate in favor of full implementation of the rate regulation rules, particularly the local basic service regulation aspect, being set on a date that allows a reasonable transition period in which to make necessary changes, and that coordinates with these other factors. When Congress passed the Communications Policy Act of 1984, thereby deregulating basic cable rates that were subject to effective competition, it stressed the importance of giving the Commission flexibility in promulgating its rate regulation rules because of the many changes that had to be made.[332] Accordingly, Congress provided for a two-year transition period in which the Commission could fully implement its rate regulation rules.[333]

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[331] See 47 U.S.C. § 543(b)(6).

[332] See 1984 House Report at 66.

[333] 47 U.S.C. § 543 (1984).

While the Commenters do not suggest a two-year transition period for implementation of the new rate regulation rules, they do assert that the rationale for allowing a transition period following enactment of the 1984 Cable Act still exists with respect to re-regulating basic cable rates under the 1992 Cable Act. Therefore, this reasoning should be taken into consideration in setting an effective date for the Commission's new rate regulation rules. The Commenters suggest January 1, 1994 as the earliest possible date which provides adequate time for the necessary adjustments to the new regime.

CONCLUSION

As these comments demonstrate, the 1992 Cable Act generally provides only a framework for the imposition of a new rate regulation regime upon the cable television industry. The Commission is left to fill in the massive details of that framework. Thus, Congress has given the Commission tremendous latitude to design specific regulations to implement the statute. The Commission can use its authority to institute a fair, reasoned regime, or it can effectively halt the cable industry's expansion of programming, plant, and technology, which has contributed significantly to customer satisfaction, employment, and the economy as a whole.

As the legislative history of the 1992 Cable Act has recognized:

> The Committee finds that since deregulation took effect in December 1986, the cable industry, as the Committee hoped, has invested substantially in capital improvements and programming.... Basic cable networks spent $1.5 billion for programming in 1991, an increase from $745 million in 1988, and more than four times the $340 million spent in 1984. Similarly, the typical cable system offers 30 to 53 channels today compared to the typical 24 channels or less before the [1984] Cable Act was enacted.[334]

A heavy-handed approach to implementation of the rate provisions of the 1992 Cable Act would surely jeopardize these pro-consumer effects. The Commenters therefore strongly urge the Commission to take a cautious, reasoned approach in implementing the 1992 Cable Act's rate regulations. Otherwise, its regulations could

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[334]House Report at 31.

cause massive disruptions to the cable industry and to consumers, contrary to the intent of Congress.

Respectfully submitted,

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Arizona Cable Television Association
Cable TV of Georgia
Cable Video Enterprises
Coaxial Communications, Inc.
Hauser Communications
Mid-America Cable Television Association
Mt. Vernon Cablevision
Pennsylvania Cable Television Association
Prestige Cable TV
Star Cable Associates
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AHH/4174